It might be very useful to refer to the case of *Northern Ireland Road Transport Board* v. *Benson*[2] which, to my mind, seems to further fortify the defendants' contention that there had been no acquisition of property within the meaning of Article 13. In that case the Court of Appeal of Northern Ireland considered the validity of section 15(1) of the Road and Railway Transport Act (Northern Ireland) 1935. This section reads —

"A person other than the Board shall not use a motor vehicle on any public highway for the conveyance of their passengers or their luggage or the carriage of merchandise for hire or reward except with the consent in writing of the Board and approval of the Ministry of Home Affairs."

The Act was challenged as being *ultra vires* the Parliament of Northern Ireland having offended section 5 of the Government of Ireland Act which reads —

"In the exercise of their power to make laws under this Act neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law so as either directly or indirectly to take any property without compensation."

Andrew C.J. in the course of his judgment said —

"There is in my judgment a fundamental and well recognised distinction between taking or authorising property to be taken without paying compensation, this involving an actual use or taking of property into possession, and a negative or restrictive provision which merely involves interference with the owner's enjoyment of property."

"This principle appears to me to be directly applicable to the present case. Section 15(1) did not either expressly or impliedly transfer the possession or ownership of the goodwill of the undertaking from the defendant to the Board. It did not effect a 'taking' of the goodwill."

"Section 15(1) in my opinion amounted at most to a mere prohibition, or, as I would prefer to call it, in the words of the marginal note, a 'restriction' as to the user for certain purposes of motor vehicles for reward upon the public highway — an interference with the full enjoyment of property."

In the light of my findings I do not find any further necessity to determine whether "property" under Article 13 includes "goodwill."

For these reasons I would once more emphasize that there are no grounds to support the plaintiffs' contention that section 35A of the Act is unconstitutional and of no effect. I would also hold that in the instant case there was no acquisition of property within the meaning of Article 13 of the Federal Constitution.

It is my judgment that there is no liability on the part of the defendants to meet the claim made by the plaintiffs. The claim is therefore dismissed. The plaintiffs shall pay costs to both defendants.

Claim dismissed.

Solicitors: *K. Y. Foo & Co.; Tunku Zuhri, Manan & Abdullah.*

SHEIKH AMIN BIN SALLEH v. CHOP HUP SENG

[O.C.J. (Gill C.J.) July 21, 1974]
[Muar — Civil Suit No. 10 of 1971]

Torts — Damage by fire — Negligence — Nuisance — Rule in Rylands and Fletcher — Damages.

The plaintiff was the owner of a piece of land on which was a wooden bungalow, in which he lived. The plaintiff also built 8 terrace houses on his land, four of which were rented by the defendants. The defendants built a big brick oven at the back of two of those premises and also made alterations so as to form the four houses into one unit. The defendants used the premises for the purpose of a bakery and this fact was known to the plaintiff. A fire broke out in the premises and this resulted in the total destruction of the eight terrace houses. The plaintiff claimed damages for loss arising from the outbreak of the fire on the allegation that the fire started from the defendant's oven.

Held: (1) on the facts, it would seem clear that the only place where the fire could have started was the defendant's oven;

(2) there was ample evidence in this case to show that the plaintiff assented to or acquiesced in the use of the defendant's premises as a bakery with an oven therein and therefore the defendants could not be held liable in damages under the rule in *Rylands* v. *Fletcher;*

(3) there was no evidence in this case that the defendants had caused or permitted to exist on their premises a source of fire danger constituting a material injury to the plaintiff's property and therefore the plaintiff's claim on the basis of nuisance must fail;

(4) in all the circumstances of this case, the failure of the defendants to have someone to keep watch over the premises until the fire had been put out or extinguished itself was sufficient evidence of negligence and therefore the defendants were liable in damages on the basis of negligence;

(5) the measure of damages in the present case would be the cost of rebuilding the eight houses within a reasonable period after their destruction bearing in mind that it was the duty of the plaintiff to minimise the damages.

Cases referred to:-

(1) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.
(2) *Read* v. *Lyons* [1947] A.C. 156, 183.
(3) *Overseas Tank Ship (U.K. Ltd.)* v. *The Miller Steamship Co. Pty. Ltd.* [1967] 1 A.C. 617.
(4) *Hiap Lee (Chong Leong & Sons) Brickmakers Ltd.* v. *Weng Lok Mining Co. Ltd.* [1974] 2 M.L.J. 1.
(5) *Leong Bee & Co.* v. *Ling Lan Rubber Works* [1970] 2 M.L.J. 45, 46.
(6) *Goldman* v. *Hargrave* [1967] a A.C. 645, 663.

CIVIL SUIT.

Goh Bin Lay for the plaintiff.

Keith Sellar for the defendant.

Gill C.J.: The plaintiff in this action is the owner of a piece of land in the Mukim of Simpang Kanan in the locality of Bukit Desir, Batu Pahat, which he purchased in 1955. There is a wooden bungalow on the land in which he lives. In or about the year 1961 he built on the land six wooden single storey terrace houses in a row adjoining one another, which were numbered as units A, B, C, D, E and F. A year or two later he built two more wooden terrace houses adjoining the existing row of terrace houses which were numbered as units G and H.

The defendant firm owns a large biscuit factory in the same vicinity on the main road opposite the road leading to the 8 terrace houses. On 1st May 1961 the defendants rented unit F from the plaintiff and built therein an oven for baking bread and cakes.

They rented units D and E in September 1962 and unit C in October 1962. The result was that they became the plaintiff's tenants of terrace houses C, D, E and F in the centre of the row of 8 terrace houses with units A and B on one side of their combined premises and G and H on the other side.

Having obtained the tenancy of the four terrace houses, the defendants made alterations to D and E so as to build a big brick oven at the back of those premises. They also made alterations to C and F so as to turn the four houses into one unit. Units A, B, G and H were rented out by the plaintiff to individual tenants. In September 1970 the tenant of unit A was one Mohamed Koya. Unit B was vacant as its tenant, one Tan Hock Huat, had moved out one month earlier. The tenants of units G and H were one Lau Poh Chin and one Lau Koh Yap respectively.

On 2nd September 1970 at about 9 p.m. a fire broke out in the premises resulting in the total destruction of the 8 terrace houses and partial damage to the plaintiff's bungalow which was at the back of terrace houses E, F and G and similar damage to a bungalow which was then under construction behind units A, B and C. The plaintiff's claim in the action is for damages for loss arising from the outbreak of fire on the allegation that the fire started from the defendants' oven.

That the defendants rented the terrace houses from the plaintiff for the purpose of using them as a bakery is not in dispute. The plaintiff's evidence is that he rented the terrace houses to the defendants as residential units but that he did not know to what use the defendants were going to put them. After he had rented out unit F, he noticed that the defendants had built an oven therein for baking bread and cakes. Later he saw that the defendants had installed a big oven at the back portion of premises D and E. He told the defendants not to carry on a bakery business on the premises, but they told him that it was but a small business and they had obtained a licence for it from the government. So he did not want to disturb their business and let them carry on.

The plaintiff's story as to how the fire started is this. At about 9.30 p.m. on 2nd September 1970, when he was inside his room in his bungalow, his son Abdul Majid informed him that a fire had broken out in the kitchen portion of the terrace houses. Hearing this he went out and saw a fire in the portion of the houses where the oven was. He tried to open the rear door but found it to be locked. He went round to the front of the house and found the front door also locked. He then went to the back of the house and prised open some planks of the wall and entered the premises. He found that some firewood which was piled up in front of the oven had caught fire. The wall between premises D and E had also caught fire, and the fire was about 5 feet high. The electric light in the premises near the oven, a long florescent tube, was on. He tried unsuccessfully to put out the fire by pouring water on it. There was nobody in the premises where the oven was and there was nobody in houses C and F. No one came to help him to put out the fire. Only his daughter Azizah came to drag him out. Subsequently at about 10 p.m. some fire brigades arrived but they were unable to put out the fire. The fire spread and destroyed all the 8 terrace houses. It also spread to his bungalow house and burned a part of the kitchen portion of the house, and a part of the bungalow house which was then under construction was also burnt.

Under cross-examination the plaintiff testified that at no time had he seen smoke in the premises occupied by the defendants after 6 p.m. He agreed that there was a big stack of fire wood at the back of the premises, but he maintained that he saw a small stack of fire wood in front of the oven which was presumably to be used the next morning and was left there to dry with the heat of the oven. He prised open the planks not directly behind the oven but to the side near the back door of E. He denied that there was a double wall at the place where he entered. It was not true, he said, that there was a second wall with a locked door before one could enter the place where the oven was.

The plaintiff's daughter Azizah (PW5) gave evidence to say that on 2nd September 1970 at about 9.30 p.m. a fire occurred in her father's terrace houses at the back of her father's bungalow. She went out of the house and saw the fire. According to her, the fire started in front of the oven in the house. She saw her father prise open the planks and enter the house. When she did not see her father come out she shouted to him. Later her father managed to open the rear door. She entered the house and pulled him out. While in the house she saw that the electric light was on, and there was a fire in front of the oven. She then went back to her house and started collecting her things lest the fire should spread. In fact the back portion of her father's bungalow did catch fire. Eventually the whole row of terrace houses was burnt out.

It was put to this witness under cross examination that she did not enter the building, but she maintained that she did and pulled out her father from the house. Her other evidence under cross examination was as follows. She did not see any one in the vicinity. There were people living there. There were occupants in houses A, G and H but she did not see any of them there. She shouted out that there was a fire, and so did her younger brother. People came out and she saw many of them there but she could not say whether they saw her or not. The tenants knew her and her father by sight. It was put to her again under cross examination that she was not in the vicinity of the fire, but she maintained that she was there and she was not telling lies.

Aminah bte. Baba (PW6) is the widow of Mohamed Koya who was the tenant of house A and had died before the trial of the action. Her evidence is that on the night in question she was sleeping in the house together with her husband and children. Somebody knocked at her door. When she went up to ask what the matter was she heard many people shouting "Fire, Fire". Her husband and she went out through the back door, and she saw the fire in the rear portion of the houses somewhere in the middle of the four houses occupied by the defendants. She then went back into her house and took her children out one by one by a side door. Her house was not on fire but smoke

had seeped in. She switched on the light before taking out her youngest child. The electric light went on.

Under cross examination Aminah said that her husband and she were running a small sundry goods shop in her house with the knowledge and consent of the plaintiff. Prior to his death her husband had issued a writ against the defendants. As regards the fire, she said that the wall at the back of the oven was on fire and that was the only portion of the building which she saw on fire at that time. She did not know how the fire started and she did not see the plaintiff or his daughter there. It was put to this witness that there was fire in all the roofs of the houses when she went out. She said that that was not true and added that there was no fire in the roof of her house and she saw no fire on the roofs of any of the other houses. She saw smoke only on the floor. She was outside her house when the fire engines arrived. The roof of her house collapsed but she could not say whether that was before or after the fire engines arrived. She did not know what happened to the other houses, and she could not say whether her house was the last house to burn down.

The man in charge of the fire brigade in Batu Pahat on the night of the fire was Syed Abu Bakar bin Osman (PW4). On receiving a summon to put out the fire at about 10.10 p.m., he proceeded to the scene with two fire engines. His evidence is that he and his men were not successful in putting out the fire because it was already too big when they arrived at the scene. He saw that the fire had spread to all the houses up to the roof and it was biggest above the kitchen portion of the buildings where the oven was. The impression he formed was that the fire started from below and spread upwards, because when he arrived at the scene the roof had not fallen and the fire was going up. He expressed the opinion that the fire was not caused by an electric short circuit because it was going up from below and the electric wires were running along the beams below the roof. He further said that the fire must have started from the oven and spread outwards on both sides because the oven was the only place from where the fire could have originated.

Under cross examination this witness went on to reiterate that as the roof had not collapsed he formed the opinion that the fire started from below and that it would have been impossible for the fire to have started from the roof. When he arrived he could see that the walls near the oven had been burnt. He saw a pile of wood on fire near the oven. All the walls had been burnt down. Only the pillars were standing and the roof was still burning. From the front of the house he noticed a stack of wood about two feet high in front of the oven still smouldering. The roof collapsed about half an hour after his arrival at the scene.

Syed Abu Bakar was recalled for further cross examination. What he then said may be summarised briefly as follows. Although the fire had taken place 3 years earlier, he was quite certain about the evidence which he gave as regards the walls having been burnt down and the pillars and the roof being still there when he arrived. The roof was standing on wooden pillars which were made of thick wood as opposed to the walls which were made of planks. It was not true, he said, that the roofs of B and C collapsed first. He went on to say that all the roofs collapsed more or less together with the walls some time after his arrival there. He agreed that because of the heat from the fire no one could go nearer than 40 feet from the building, but it was not true that it was not possible to see inside of the building when he arrived. He saw the oven from in front, standing almost opposite to it at a distance of 40 feet. He did not see the wooden security fence in front of houses C, D and F, and it was not true that it was not possible for him to see inside the building because of smoke, fire and the security fence.

Having dealt with the evidence for the plaintiff as to where the fire started and its probable cause, I now come to the evidence produced by the defendants which deals largely with the safety precautions taken in building the oven and operating it so as to prevent any risk of fire. The defendants have, however, produced some witnesses who saw the fire so that it would be more appropriate to take their evidence first.

One of the witnesses produced by the defendants is the Ketua Kampong of the area in which the fire took place, Haji Nawawi bin Haji Salleh (DW3). On the evening of the fire he had gone to the stadium at Batu Pahat to see the National Day celebrations. After the celebrations he was returning home by car at 8.30 or 9 p.m. and he had to pass the plaintiff's house to get to his house. His evidence is that when he reached Simpang Tiga he saw the plaintiff's row of 8 houses on fire. There was smoke and fire inside the houses but the roofs were then not on fire. There was some wind and the fire spread to the front portion of the houses from inside. When the fire brigade arrived, the walls were still burning and the fire had reached the roof. One could not reach very near the building but had to stand about one chain away to see what was going on, and he could not see into the building.

Teo Lian Hak (DW4) has a house on the same road as the 8 terrace houses belonging to the plaintiff. Coming from the main road one has to pass his house to get to those terrace houses. His house was the only house in the vicinity with a telephone. At about 9.30 p.m. his son informed him that the plaintiff's houses were on fire, whereupon he telephoned to the fire brigade and to the defendants. As he went out of the house he saw that a crowd had gathered. He did not go up to the houses which were on fire but watched from the five foot way of his house, which was about 100 yards from the plaintiff's houses. He saw fire on the roof which, he said, started from the last two or three units from the end where an Indian was running a Sundry Goods shop. Later he heard a sound as if the electric wires from the other units had caught fire. His evidence under cross examination is that standing from where he was he could see the roofs of all the houses but only the side wall of the first house, there being no other house there in between his house and the plaintiff's houses. He further said that standing from where he was, he could not say whether any of the walls were on fire or whether there was fire inside any of the houses. He heard the hissing noise of electric wires after he had made the two tele-

phone calls and had come out again to the five foot way.

The evidence of Teo Ah Lek (DW10) is that he returned home at about 9 p.m. As he was approaching his house he saw some flames of fire and smoke somewhere at the extreme end of the row of terrace houses. He informed his father about it. Later he came out of the house with his father and watched the fire as it slowly came up to house H. The fire was in between the roof and the walls. When the fire engine arrived half an hour later the fire had gone more than half way down the walls. The roof of the houses collapsed followed by the walls. Like his father he saw only the side wall of house H.

The tenant of house G Loh Poh Choon (DW5) woke up from sleep when she heard shouts and saw her house on fire. She collected whatever she could lay her hands on and ran out of her house. Her evidence is that when she first ran out she saw that there was fire on the roof of the house at the extreme end, a Sundry Goods shop, but she then goes on to say that she saw fire on the roof but could not pin-point on which house as she did not pay any particular attention and was more concerned about collecting her belongings.

Although there was no one present in the defendants' premises, they had a man called Chua Ah Tee (DW7) who worked in their main bakery but slept on the premises of their smaller bakery at Bukit Desir. His practice was to go to his room in the small bakery after work in the evening, have his bath and a change of clothes and return to the main bakery for his evening meals after which he apparently took his own time to return to the small bakery to sleep. His evidence is that on the evening in question he went to the small bakery between 6 and 6.30 p.m., he had his bath and change and returned to the main bakery for his evening meals. He was watching television at the main bakery when he was informed about the fire at the smaller bakery at between 8.30 and 9 p.m. On hearing this he got on his bicycle and went straight to the scene of the fire.

When he arrived near the terrace houses he saw the roofs of all the terrace houses on fire. Outside the defendants' premises in front there was a wooden fence. He opened the gate of the fence and then opened the door to his room and rushed in to collect his belongings. When he entered the room he found the electric wires on the ceiling on fire and he heard a hissing sound. The roof and the small beams fell on his arms as a result of which he was injured. He ran out without collecting anything. His evidence is at that time the walls of the premises were not on fire. Having rushed out of the room he went up to a house opposite the terrace houses where he stood watching the fire for a few minutes. Then he walked to the main factory to request his employers to send him to hospital.

He stated under cross examination that the roofs were made of zinc, a few pieces of which might have dropped off, and there were flames of fire above the roofs. Notwithstanding the fact that the fire was dangerous, he entered the room where he used to sleep. Having rushed out of his room he stood at a distance of about 60 feet and watched the fire for about 10 minutes after which he left without waiting there to see the whole building burn down. He was hospitalised for more than 20 days.

Keok Chu Keoh (DW11), a partner in the defendant company, was at the main factory when he was informed about the fire after 9 p.m. He instructed all the people in the factory to carry pails and proceed to the small bakery to render assistance. He himself drove in his car with some of his workers to the scene. On arriving there he parked his car outside the public water standpipe about 100 feet from house H and walked by the side of the rear of house H to the plaintiff's house. His evidence is that from there he saw fire as well as smoke coming out from the houses at the other end of the road, that is, houses A, B and C. At the extreme end of house A both the walls and the roof were on fire which then spread to the other houses including his factory. He could not do anything because the fire was getting bigger and bigger. He remained at the back of plaintiff's house for about 5 minutes and then went back to his car from where he continued to watch the fire. About half an hour later a fire engine arrived. By then the fire had engulfed the walls and the roof. It was not possible to get too close to the fire because the heat was strong. One could not see what was inside the building because of smoke and fire. He left after the roof collapsed, and he did not see the plaintiff that night.

I have thus far dealt with the evidence of witnesses both for the plaintiff and the defendant who claimed to have seen the fire. As I have stated earlier, the main defence to this action is that the oven in the small bakery was so built that it was impossible for the fire to escape from there and set fire to the building.

That brings me to the evidence of Kuo Choo Song (DW1), the managing partner of the defendant company, which is as follows. The oven was made of bricks and it took about a month to construct. Its length was 23 feet, its height 5 ft. 5 inches and its width 6 feet. It had two chimneys on either side, approximately 11 feet in height made of cement pipe in the lower part and zinc in the upper part. He had informed the plaintiff before starting construction work so as to make it known that he was building an oven. In the middle of the oven was an opening 20 inches in height with a width of 18 inches and a depth of 4 feet, for the firewood to be put into the oven. Below the opening was another small opening to allow ashes falling from the fire to be taken out. On either side of the oven were openings for insertion of trays for baking biscuits. Underneath the trays they kept live charcoal after they had been covered with ashes so as to produce gentle heat for the baking of biscuits. They had a supervisor and two girls to assist him for operating the bakery. The fire was started in the oven between 7.30 and 8.30 a.m. daily except for Sundays. Baking was started soon after that, and it finished by about 6 p.m. Normally by the end of the day very few embers were left in the fireplace and his instructions to his workmen were to extinguish the remaining embers in the oven at the end of the day with water. He personally supervised the bakery from 8 to 8.30 a.m.

daily. He also went there off and on daily during the day whenever he had the time and he went there daily at about closing time.

Continuing his evidence he said that on 2nd September 1970 he went to the bakery at 6 p.m. When he arrived there the workmen had already left. He checked the oven and saw that the embers had been extinguished. There were no piles of firewood near the oven nor were there bits of firewood scattered about the floor. He kept his supply of firewood for the oven well behind the terrace houses in the open space between the plaintiff's bungalow and the bungalow then under construction. He was quite satisfied when he left the premises on the evening of 2nd September 1970 that the embers in the oven had been extinguished and that the oven was out of commission. There had been no fire on the premises previously.

Under cross examination this witness said that he left the work of extinguishing the embers to his workmen without requiring them to do it in his presence. During the period of 9 years he did not find a single occasion when his instructions for extinguishing the fire were not carried out. Nevertheless, he did not leave it entirely to his supervisor to see that the fire had been put out and that everything was in order. His workmen could lock up and go when their working hours had ended without waiting for him. He had to open up the place in order to check everything. That was what he did on 2nd September, 1970 when he found no one on the premises when he arrived. He did not see there Chua Ah Tee who was only allowed to use the premises for sleeping and was not required to arrive there at any particular time. He was not their night watchman and he was not paid anything to sleep there. He did not know whether Chua Ah Tee slept there every night. They had no watchman to look after the premises after 6 p.m. and during the night.

He maintained that at no time was firewood stacked in front of the oven and that firewood was fetched from outside each time the fire had to be replenished. He then made a grudging admission that sometimes a small heap of firewood would be kept near room D as shown in Exhibit D9 to feed the fire during the day, but that what was not used during the day would be taken out, so that each time he visited the premises in the evening he found no firewood whatsoever in front of the oven. To contradict the evidence of the plaintiff that he prised open the planks from the back wall in order to enter the premises, the witness said that there was an additional wall at the back of premises E and F but that he omitted to show it in the plan D9. Nonetheless, it is quite clear there was only a single wall to a portion of the defendants' premises.

Ch'ng Poh Beng (DW8) was the supervisor of the small bakery. He had working under him in the bakery Tan Soo Sai (DW6) and a girl called Yoke Eng. The evidence of Tan Soo Sai is that he used to stop baking for the day at about 5 p.m. and did not put any more firewood into the fire place after that. By that time there would not be any more fire in the central fire place except for a small quantity of embers which would gradually die off. If there was anything to be done to the embers, that would be the duty of Ch'ng Poh Beng. For the central fire place she brought firewood from outside the bakery whenever it was needed. She took the firewood and put it straight into the fire place, and when she left in the evening she did not leave any wood beside the oven. If there was rain there was spare firewood behind the house under shelter. She says that DW1 came to the bakery every day but goes on to add that she did not pay attention as to whether he came everyday or not.

Ch'ng Poh Beng (DW8) said that two or three pieces of firewood were put into the central fire place every 10 or 15 minutes. This went on until 5 p.m. It was not his habit to allow wood to be placed inside the premises. On 2nd September 1972 he left the bakery at about 6.15 p.m. after he had cleaned up the area and inspected the oven. There were no pieces of fire wood when he left either in the vicinity of the oven or anywhere inside the premises. He locked all the doors before he left. According to him, DW1 came to the bakery very often. Normally he came at about 8.30 a.m. but sometimes he turned up in the evening after the workers had left but while he was still there. He maintained under cross examination that he did not leave any partly burned firewood in the fire place before leaving the bakery on the evening of the fire, and that at no time during the whole period of 7 years of his service with the bakery did he leave damp firewood near the oven overnight for it to dry up a bit for use next morning.

In order to show that they took the same sort of precautions as the other bakeries in Batu Pahat, the defendants called Teo Ah Soon (DW12), the sole-proprietor of a biscuit factory, to give evidence as to how he operated his oven. His evidence is more or less similar to the evidence given by the defendants' employees except for this difference that he would go round at about 7 p.m. to see if there were any embers in the central fire place and splash water over them if there were. Moreover, his father and one of his workers lived in the bakery.

It is to be observed that two of the witnesses for the defendants gave evidence to say that at the time of the fire they heard a hissing noise to indicate that the electrical wires had caught fire. Their evidence presumably was introduced in order to show that the fire may have started because of an electric short circuit somewhere in the row of 8 houses. They also called Wan Zanudin bin Abidin (DW9), a technical assistant attached to the National Electricity Board at Batu Pahat, to give evidence regarding the general condition of the wiring for the supply of electricity to the terrace houses. His evidence, however, does not help the defendants in any way because the only house then lying vacant was unit B from which electricity supply had been cut off many days before the fire, so that no short circuit could have taken place in those premises. It is clear from the evidence that no fire was produced by electricity either in unit A or unit H, the occupants of which gave evidence. And there is no evidence as to whether anybody was present in unit G. If there had been someone in that house that night and the fire had originated from there, I have no doubt he would have been called as a witness. In any

event there is no evidence whatsoever that any fire started from that house.

Taking the evidence as a whole, it would seem clear that the only place from where the fire could have started was the defendants' oven. It is to be observed that none of the defendants' witnesses was present at the scene when the fire was in its early stages. Indeed, none of them except Chua Ah Tee (DW7) went close enough to the fire, and he rushed in at a later stage in order to save his belongings but had to make a hasty retreat because of the progress of the fire. The evidence of the plaintiff would seem to indicate that apart from his son he was the first person to see the fire followed by Aminah. Another person who saw the fire at about that time was the Ketua Kampong Haji Nawawi (DW3) who was called by the defendants as their own witness, and his evidence tends to corroborate that of the plaintiff. His evidence is that he saw smoke and fire inside the houses and that at that time the roofs were not on fire. He went on to say that the fire spread to the front portion of the houses from inside. His further evidence is that when the first brigade arrived the walls were still burning and the fire had reached the roof so that the whole building was in flames. The evidence of this witness is corroborated by that of the fire brigade chief who said that all the indications were that the fire started at the back of the premises occupied by the defendants. He said that standing in front of the building he could see the oven and a heap of fire wood on fire near it. It was put to this witness that the fire was so intense that he could not have got close enough to see all that he claimed to have seen. Notwithstanding the criticism of this witness' evidence by counsel for the defendants, I must hold that this witness from the very nature of his duties was better qualified to give the court a clearer picture of the fire when he first arrived on the scene. After all it was his duty to put out the fire. I therefore cannot believe that he did not go close enough to the fire to carry out his investigations in order to decide how the fire could be put out. By the time he arrived the fire had progressed to such an extent that it was not surprising that it could not be put out, bearing in mind that the houses were wooden houses.

For the reasons I have stated, I accept the evidence of the plaintiff and of his witnesses to be substantially true. That evidence to my mind effectively negatives any suggestion that the fire originated from any premises other than those of the defendants' due to an electrical short circuit. I am prepared to accept the evidence of the managing partner of the defendant company and his two employees in the small bakery as to the general precautions which they took to prevent the escape of fire from the oven but I reject the evidence that the defendants' employees put out the fire before they left the premises on finishing their work for the day and that the managing partner visited the bakery every evening to see that the fire had been put out. The managing partner said that the workmen had left the bakery when he arrived there at 6 p.m., whereas the worker said that he left at 6.15 p.m. To my mind their evidence that the fire was put out soon after the baking of biscuits was stopped is highly improbable. This view is supported by the evidence of the independent baker who said that he would wait for embers to die off and the ashes to cool down before he took any steps to put out the fire, which he did at about 7 p.m.

I cannot accept the evidence adduced on behalf of the defendants that pieces of firewood were fetched from outside every time the fire had to be replenished. The normal practice for anybody would be to keep at least a small stock of firewood near the oven for the purpose of stoking the fire every now and then. Indeed the managing partner did admit under cross examination that sometimes firewood is stacked in front of the oven, although he hastened to add that it was taken out at the end of the day. I certainly do not accept the evidence that the fire in the oven was effectively put out on the evening of the fire. In my judgment the evidence of the managing partner and his employee is too good to be true. In all the circumstances of the case I have very little difficulty in arriving at the conclusion that the fire originated from the defendants' premises. In this connection it is to be observed that the fire chief formed the theory that the fire started from the embers in the oven being fanned by wind. And there was the evidence of the Ketua Kampong that there was some wind before the fire brigade arrived.

The plaintiff bases his claim for damages on the doctrine of *Rylands* v. *Fletcher*,[1] nuisance and negligence. Now, fire is a dangerous thing. Consequently the principle of *Rylands* v. *Fletcher* applies to it. At common law if a fire started in the house or on the land of one man and spread to the land of another, the person from whose house or land the fire started had to make good the damage. But a person who consents to the dangerous thing being brought to a place from which it may cause him injury if it escapes, has no right of action unless he can prove negligence. There is ample evidence in this case that the plaintiff assented to or acquiesced in the use of the defendants' premises as a bakery with an oven therein. The defendants therefore cannot be held liable in damages under the rule of *Rylands* v. *Fletcher*.

As regards nuisance, it has been defined as an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land when it is a private nuisance. (See *Clerk & Lindsell* on Torts, 13th Ed. paragraph 1391). As Lord Simonds pointed out in *Read* v. *Lyons*[2] the rule in *Rylands* v. *Fletcher* is closely connected with the law of nuisance, and in many cases liability can be established indifferently under either head.

In giving the judgment of the board in *Overseas Tankship (U.K.) Ltd.* v. *The Miller Steamship Co. Pty.*,[3] Lord Reid pointed out that negligence is not an essential element in determining liability for nuisance. Lord Cross in delivering the judgment of the Privy Council in *Hiap Lee (Chong Leong & Sons) Brickmakers Ltd.* v. *Weng Lok Mining*[4] said: —

"All that is necessary is that the possibility that the use which he was making of his own land might interfere with the use or enjoyment by his neighbour of his land was something which the defendant might reasonably have foreseen."

In *Leong Bee & Co.* v. *Ling Nam Rubber Works*[5] their Lordships of the Privy Council said: —

"Counsel for the appellants conceded in argument, and their Lordships do not doubt rightly conceded, that in Malaysia the common law presumption referred to in *Becquet* v. *MacCarthy* (1831) 2 B & Ad. 951 at p. 958, *Musgrove* v. *Pandelis* [1919] 1 K.B. 314 at p. 317 and *Mason* v. *Levy Auto Parts of England Ltd.* [1967] 2 Q.B. 530 at pp. 538, 539 that a fire which began on a man's property arose from some act or default for which he was answerable, has no application in Malaysia, and has had no application there at least since the coming into force of the Civil Law Ordinance, 1956, section 3. The reason is that having been displaced by statute, first by 6 Anne c. 31, section 6 and later by the Fires Prevention (Metropolis) Act, 1774, 14 Geo. 3, c. 78, section 86, the presumption formed no part of the common law of England as administered in England at that date. Upon the appellants lay the burden of proof as to both negligence and nuisance, and their task at the trial was to establish, without the aid of the presumption, (a) that the respondents themselves or some person for whose conduct they were answerable had been guilty of some negligent act or omission which was a cause either of the commencement of the fire or of its spreading to the appellants' premises, or (b) that the respondents had caused or permitted to exist on their premises a source of fire danger constituting a material injury to the appellants' property. If they succeeded on either issue they had further to establish, for the assessment of damages, that the destruction of their building was reasonably foreseeable as a consequence of a kind likely to flow from the respondents' wrongful conduct: *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Pty. Ltd.* [1961] A.C. 388."

Applying the principles enunciated in the cases which I have just cited, it would seem clear that although the defendants' premises may be described as a fire hazard by reason of the fact that there was a continuous fire burning in the oven, particularly in the central fire place, from about 8 a.m. until 5 p.m., there is no material upon which a finding can properly be made that either the construction of the oven or the way in which it was operated created any material danger of fire. In other words, there is no evidence that the defendant had caused or permitted to exist on their premises a source of fire danger constituting a material injury to the plaintiff's property. The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. I do not think there is any evidence of that in this case. I must therefore held that the plaintiff's claim on the basis of nuisance also fails.

That leaves negligence as the only other ground on which the plaintiff can possibly succeed. As was pointed out by the Privy Council in *Leong Bee's* case, the common law presumption that a fire which began on a man's property arose from some act or default for which the defendants must be held answerable has no application here. To put it in other words, the unexplained starting of a fire on the defendants' premises of itself can be no evidence of negligence. This means that the burden of proof as to negligence lies on the plaintiff, so that he has to establish without the aid of any presumption that the defendants themselves or some person or persons for whose conduct they were answerable had been guilty of some negligent act or omission which was a cause either of the commencement of the fire or of its spreading to the adjoining premises.

Clerk & Lindsell on Torts 13th Edn. paragraph 1516 says: —

"The question has been discussed whether a fire caused by a piece of coal jumping from a domestic grate accidentally begins within the meaning of the Act, and on this question differing judicial opinions have been expressed. No doubt the fire in the grate was an intentional and not an accidental fire, but this fire was intended to be controlled and rendered harmless by the grate. It would seem, therefore, that unless there was some negligence in the making of the fire or in leaving it in the grate unguarded or unattended or in preventing the further spread of the fire, the Act in such a case will be a defence."

The above passage refers to a fire in a domestic grate, and the Act referred to is the Fires Prevention Metropolis Act 1774. In the present case, there was an oven which undoubtedly was much bigger than an ordinary domestic grate. It was used by the defendants for their business of biscuit manufacturers. The fire in the oven was intentional and not an accidental fire. It was a continuous fire burning in the oven for almost the whole day. The fire was intended to be controlled and rendered harmless by the oven. The duty of care so as to prevent the escape of fire from the oven such as in the present case must necessarily be greater than in the case of a domestic grate. Indeed counsel for the defendants agreed that a far greater degree of care was required of the defendants than of a normal tenant using an open fire.

I do not think there was any negligence on the part of the defendants here in the making of the fire, but leaving the fire in the oven unguarded or unattended so as to prevent the spread of it is a different proposition. I believe therein lies the crux of the matter.

In *Goldman* v. *Hargrave*[5] their Lordships of the Privy Council said: —

"One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. And in many cases, as, for example, in Scrutton L.J.'s hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances."

Now, from all the evidence in this case there are the clearest indications, and I so find as a fact, that on the evening of the fire the defendants' premises were locked up without putting out the fire in the oven and without leaving somebody in charge of the premises to deal with any outbreak of fire and to prevent its spread to adjoining buildings. I also find as a fact that some firewood was left outside the oven at the end of the day. In all the circumstances of this case the failure of the defendants to have someone to keep watch over the premises until the fire had been put out or had extinguished itself is sufficient evidence of negligence. I therefore hold the defendants liable in damages on the basis of negligence.

The usual measure of damages in the case of damage to or loss of property is the cost of replacement or repair of the property lost or damaged and in addition a sum to cover the loss of the beneficial use of the property. (See *Clerk and Lindsell* on Torts 11th Edn. paragraph 642). When a chattel is damaged by a

wrongful act, one direct consequence is that the owner, besides being put to the expense of repairing it, is deprived of its use during the period of repair, and for this loss of use he is entitled to recover. (See *Clerk & Lindsell* on Torts 11th Edn. paragraph 267). The measure of damages in the present case therefore would be the cost of rebuilding the 8 houses within a reasonable period after their destruction, bearing in mind that it was the duty of the plaintiff to minimise the damages.

The plaintiff's evidence is that it cost him $10,000/- to build the 6 terrace houses in 1960 and $4,000/- to build the other terrace houses in 1962. According to him the 8 houses were worth $27,000/- to $28,000/- in 1970 because of the rise in the price of land and the cost of materials, the houses alone being then worth slightly more than $20,000/. He says he spent $2,000/- to repair the damage to the back portion of his bungalow. As regards the bungalow which was then under construction, he says that he had spent between $3,000 to $4.000 on it and had to demolish it because of the damage to it by the fire.

Ungku Abdullah bin Suleiman (PW3), a licensed 1st class Appraiser and Auctioneer, issued a valuation report in respect of the 8 units of terrace houses at the request of the plaintiff's solicitors on 14th March, 1972, which has been put in evidence as Exhibit P8. In his report he has valued the 8 houses which were totally destroyed at $16,000/-. His estimate of the damage to the plaintiff's bungalow is $600/- and the damage to the bungalow then under construction $300/-. His estimated cost of rebuilding the 8 units is $28,000/-, of repairs to the kitchen $1,500/- and of replacement to the damage to the bungalow under construction $500/- making a total of $30,000/-.

His evidence is that he saw similar houses in the neighbourhood. They cost about $2,000/- each when they were built at about the same time as the plaintiff's 8 houses. He further says that he would have valued those houses at $2,600/- or $2,700/- at the time of his report. This witness went on to testify under cross examination that he could not give the court the total cost of the 8 houses as the plaintiff was not able to produce any bills or receipts, and that he did not know then that the plaintiff built the houses himself with casual labour. He finally agreed that in November 1973 when the plaintiff obtained a loan from Bank Bumiputra each unit would have cost him about $2,000/- if he did the work himself with casual labour. The evidence of the manager of Bank Bumiputra, Batu Pahat branch, Encik Abdul Rahman bin Mohamed, is that his bank gave a loan of $4.000/- to the plaintiff to erect 4 terrace houses and that the practice of his bank was normally to grant 50% to 60% of the cost of construction. This evidence would seem to corroborate the evidence of the appraiser as regards the cost of rebuilding the 8 houses in 1973, and his estimate of the damage to the kitchen portion of the bungalow is $600/- and of the damage to the bungalow then under construction $300/-. Taking all that evidence into account I do not see how I can award the plaintiff any more than $16,000/- for rebuilding the 8 terrace houses and $900/- for the other damage which he has suffered. He obviously had the damage to the kitchen portion repaired at about that time.

As regards loss of rent there is no dispute as to the total monthly rental of $148/-. It is submitted by counsel for the defendants that the plaintiff should have obtained a loan earlier from the branch of Bank Bumiputra at Malacca or Johore Bahru and not waited for the opening of the branch at Batu Pahat. It is further submitted that he could have rebuilt the houses within a period of one year. I do not think I can accept that submission, but I do take the view that it should have been possible for the plaintiff to rebuild the houses within 30 months. I would therefore allow a sum of $4,440/- in respect of loss of rent for that period.

There will therefore be judgment for the plaintiff for $21,340/- with interest thereon at 6% per annum from the 1st April 1973 to date of payment and costs.

Judgment for the plaintiff.

Solicitors: *Goh Bin Lay; Keith Sellar.*